

UNPUBLISHED
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

GEORGE D. FRIEDEL, JR.,

Plaintiff,

vs.

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant.

No. C03-4115-MWB

REPORT AND RECOMMENDATION

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I. INTRODUCTION

The plaintiff George D. Friedel, Jr. (“Friedel”) appeals a decision by an administrative law judge (“ALJ”) denying his application for Title XVI supplemental security income (“SSI”) and Title II disability insurance (“DI”) benefits. Friedel claims the ALJ erred in disregarding the opinion of Friedel’s treating physician, conducting an improper credibility analysis, and posing an inaccurate hypothetical question to the vocational expert (*See* Doc. No. 6)

II. PROCEDURAL AND FACTUAL BACKGROUND

A. Procedural Background

On December 29, 2000, Friedel protectively filed an application for SSI benefits (R. 248-51), and on December 31, 2000,¹ he protectively filed an application for DI benefits (R. 46-48). In both applications, he alleged a disability onset date of July 30, 2000. Friedel alleged he was disabled due to open heart surgery, which limited the amount of time he could work and the amount he could lift. (*See* R. 61) His applications were denied initially on June 29, 2001 (R. 32, 34-38, 252-57), and on reconsideration on March 20, 2002. (R. 33, 41-44, 258-62) On April 16, 2002, Friedel requested a hearing. (R. 45), and a hearing was held before ALJ Andrew T. Palestini on September 25, 2002, in Sioux City, Iowa. (R. 270-313) Friedel was represented at the hearing by attorney Rodney D. Vellinga. Friedel and his wife, Glynis Friedel, testified at the hearing. Vocational Expert (“VE”) Sandra Trudeau also testified.

¹The face of Friedel’s DI application inexplicably bears a date of September 20, 2000. (R. 46)

On January 28, 2003, the ALJ ruled Friedel was not entitled to benefits. (R. 11-22) Friedel appealed the ALJ's ruling, and submitted some additional evidence. On October 10, 2003, the Appeals Council of the Social Security Administration denied Friedel's request for review (R. 6-8), making the ALJ's decision the final decision of the Commissioner.

Friedel filed a timely Complaint in this court on November 26, 2003, seeking judicial review of the ALJ's ruling. (Doc. No. 1) In accordance with Administrative Order #1447, dated September 20, 1999, this matter was referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B), for the filing of a report and recommended disposition of Friedel's claim. Friedel filed a brief supporting his claim on February 26, 2004. (Doc. No. 6) The Commissioner filed a responsive brief on April 13, 2004. (Doc. No. 7). Friedel filed a reply brief on April 22, 2004. (Doc. No. 8)

The matter is now fully submitted, and pursuant to 42 U.S.C. § 405(g), the court turns to a review of Friedel's claim for benefits.

B. Factual Background

1. Introductory facts and Friedel's testimony

At the time of the hearing, Friedel was 43 years old, 5'11" tall, and weighed 307 pounds. He was living with his wife and two of his five children in Oto, Iowa, which is about thirty miles from Sioux City. (R. 272-78, 290) He has a driver's license. He is right-handed. He went to school until the eighth grade, but he has a "[v]ery hard time with reading and writing," which is one of the reasons he quit school. (R. 274) He stated a psychologist at vocational rehabilitation confirmed his reading and writing limitations in a written report that his wife had to read to him. (R. 275) When Friedel got his driver's

license, a lady at the Department of Transportation read the test to him. (R. 292) He stated he learned the information he needed to pass the test by having his girlfriend read the manual to him. Friedel stated he “remember[s] stuff pretty good.” (*Id.*)

Friedel has no vocational training, except he got some training in doing “alignments and frames of vehicles and trucks.” (R. 274) He has not had any vocational rehabilitation. (R. 274-75)

Friedel considers his usual occupation to be mechanic and wheel alignment specialist. In the few years preceding the hearing, he had been doing on-site repair work of farm equipment when machinery would break down. He worked on a lot of “tirrigators,” which he explained are “fertilizer vehicle[s] that Terra Chemicals uses.” (R. 276) He stated “each one of the wheels and tires weigh[s] over 900 pounds.” (*Id.*) He would be called out by a farmer if one of the tires went flat, and he would repair it at the scene. He also worked on tractor tires, combines, and other heavy equipment. (R. 276-77)

Besides working on tires, he also did general mechanical work, both on farm sites and in a garage. For example, he would “[p]ull and replace motors on [the farmers’] combines, any of their irrigation systems, pull their motors apart [and] overhaul them, put them back onto their pedestals and turn them back on.” (R. 277) He stated an average motor weighs anywhere from 800 to 1500 pounds. To remove a large motor at a farm site, he used a boom that was mounted on the side of a big service truck. He had to push/pull the engine to get it to the boom. Some of the mechanical work he did required considerable force to break the bolts loose, and he sometimes used equipment weighing from 75 to 150 pounds. He stated he had done the same type of work since the time he quit school in the eighth grade.

Friedel stopped working on August 10, 2000, when he began having heart attacks. His first heart attack was in 1992, but apparently he did not have problems again until 2000, when he had four or five heart attacks. On two occasions, he was hospitalized at the University of Iowa Hospital in Iowa City. He had planned to go to Iowa City to see if he was on the replacement list for a heart transplant, but before he could make that trip, he had a heart attack and was transported to Iowa City from Sioux City. (R. 279-80) He stated, "They had to put a machine for my heart to beat." (R. 280) While at Iowa City, he had a quadruple bypass and some grafting. (R. 280)

Friedel attempted to return to work briefly in April 2001, when he was a relief driver for a school bus route. He stated he drove once or twice a month. (R. 292) The job ended when the school year ended. (R. 293) He found the job to be rather stressful, and he stated it caused him to belch frequently, which his medical records indicate is a symptom of his heart problem. He interprets the frequent belching as his body telling him to slow down and stop the stressful situation. (R. 293-94)

Friedel stated he is unable to stand in one place for any length of time. He can stand and move around for maybe thirty to forty-five minutes before he gets tired. He takes walks to a place about half a mile from his home, and then he will sit down to rest and catch his breath for anywhere from five to twenty minutes, depending on the humidity level, before returning home. He explained that in the grafting procedure, doctors took veins from his left leg to graft onto his heart, and if he stands for any length of time, his left leg will "swell[] up very large," and then his leg will become infected. (R. 281, 283, 289) Friedel also has problems bending and kneeling because of his leg swelling up. (R. 284)

In addition, Friedel stated that if he pushes himself to walk too fast, he will become lightheaded, and he is afraid of falling down. He described an incident when he walked

up a hill behind his house and he fell. He has fewer problems walking on a flat grade than walking on a hill. He stated when he walks uphill, he becomes “real short winded and get[s] [himself] in a lot of trouble.” (R. 285) He cannot walk uphill for the twenty-five feet from his garage to his house without stopping to rest. (R. 286) He stated doctors have explained his lightheadedness and shortness of breath, telling him that because only two chambers of his heart are functioning, he does not get enough oxygen. He stated the doctors slowed his heart rate because of his heart’s limited capacity. (R. 287)

He stated he cannot sit still because his back will starting hurting. He explained that in 1977, he was hit by a semi truck when he was riding a motorcycle, and he suffered injuries to his back including crushed or herniated disks. (R. 282) He declined to have surgery on his back, and stated his doctor acquiesced in the decision. (*Id.*)

Friedel stated his doctor has restricted him to lifting no more than twenty pounds at a time. He stated he does grocery shopping, but his wife and children carry in the heavy grocery bags, and his wife “does all the lifting” at their home. (R. 284)

According to Friedel, he is unable to perform any significant physical activity, and his condition is not improving. (R. 286) He stated a vocational rehabilitation psychologist told him he would be a good candidate for vocational rehabilitation, but the psychologist stated there was no funding at that time to provide him with any training, and it could be several years before they would have funding available. (R. 307-08)

Friedel stated he has trouble sleeping because he worries a lot. He noted he wants “to be there” for his children, the youngest of whom is nine years old. (R. 283-84)

Friedel described his average day. He gets up at 6:30, when his children begin getting ready for school. (R. 287) He takes a nap for forty-five minutes to an hour every day because he is “just shot.” (R. 288) He needs a nap regardless of how much or how little activity he engages in during the day. (R. 288) During the day, he will eat and get

ready for the half-mile walk up the hill when his children get off the school bus. Sometimes he will sit and talk with friends. (R. 287) He usually goes to bed around 9:30 p.m. (R. 288)

Friedel stated that before his heart problems began, he used to enjoy working on old cars. He had to give up the activity, and now he just looks at the cars. His doctors have told him and his wife that he is never supposed to use a vacuum cleaner. At the time his heart attacks started in August 2000, he was vacuuming his living room. He stated he can do the dishes. (R. 288-89)

Friedel feels he no longer is able to work because he lacks the stamina or strength and he tires quickly. He becomes short of breath upon even minimal physical exertion. (R. 289)

Friedel sits on the City Council in Oto, Iowa, which has a population of 174. (R. 307, 309) The City Council meets once a month to approve bills, talk about improvements the town needs, and discuss problems that have arisen. Friedel stated the bills are on a list, and a secretary gives them the information they need, so he is not required to read anything. He stated he does not let many people know he has a problem with reading. (R. 307)

Friedel stated he has a cardiologist, Dr. Peacock, in Sioux City, but he most frequently sees physician's assistant Jim Rusch in Anthon, Iowa. He stated he trusts P.A. Rusch with his life, and prefers to see him when possible. (R. 290-91) At Friedel's request, P.A. Rusch wrote a report in support of Friedel's applications for benefits. (R. 291; *see* R. 246)

2. *Glynis Friedel's testimony*

Glynis Friedel (“Glynis”) stated she and Friedel had been married for fourteen years, so they were married when Friedel had his first heart attack in 1992. She stated that until August of 2000, Friedel was a workaholic. His work involved very heavy labor and was very physical, and she stated he was strong. (R. 295-96) She noted he liked to work and “work was his hobby also.” (R. 296) He worked up until the day he had the heart attack in August 2000. (R. 299)

During the year 2000, when Friedel was hospitalized, there were three times when Glynis “didn’t know if he was going to make it.” (R. 297) Since 2000, Glynis stated Friedel has been able to lift only very light objects. He becomes exhausted easily and becomes very short of breath upon any type of physical exertion, even a slow walk. (R. 297-98) He wants to help around the house, but he can only do very limited housework. (R. 298, 301) He might wipe off the table, put away a phone book, and pick up his own clothes, but he does very little around the house. (R. 301) Glynis does not believe Friedel is capable of any physical activity. (R. 301)

Glynis was home at the time Friedel began to have the August 2000 heart attack. She stated he was vacuuming at the time. (R. 298)

Since Friedel had heart surgery and stopped working, Glynis has observed that he is “not as easy to get along with.” (R. 299) She stated he gets upset and stressed easily, and it bothers him that he is unable to work. (R. 299-300) She stated Friedel is not lazy and he wants to work, but he is unable to do so. (R. 301)

Glynis stated she has filled out most or all of the forms Friedel has submitted in connection with his applications for benefits. Friedel provides the information and Glynis fills in the form. She also does any writing, reading, and arithmetic calculations that are required in the household. She confirmed that she read the psychologist’s report to Friedel. (R. 300) She accompanies Friedel to his doctors’ appointments. (R. 301)

According to Glynis, Friedel made a brief attempt to return to work at some point after his surgery. She stated he worked for a few weeks at an oil company, “trying to get men to know what they were doing in mechanic work, trying to supervise them on their jobs.” (R. 302) She stated the job was very stressful for Friedel, with “people not knowing what they’re doing, trying to come [to Friedel] with the problems on it and him just not being able to get along with them, communicating, whatever.” (R. 302) She stated the job was all day, and Friedel would come home stressed out. (R. 303)

Glynis stated Friedel also drove a school bus for Anthon-Oto for awhile. According to her, Friedel got along well with the children. He only drove as a substitute, and very infrequently. (*Id.*)

Glynis stated she has owned her own business since 1997. Although testimony was not clear on the matter, it appears the business is the garage where Friedel did mechanical work prior to his surgery. Glynis stated Friedel had gone to the garage a few times since his surgery but he had not worked. She has another employee doing mechanical work at the garage. (R. 303-04) According to Glynis, Friedel would be unable to do the work in any event because the equipment is very heavy. She estimated the lightest piece of equipment in the garage weighs about fifty pounds, and Friedel would be unable to lift it. (R. 305)

3. *Friedel’s medical history*

The medical record evidence begins at Friedel’s alleged disability onset date. On July 31, 2000, he obtained a bus driver physical from James A. Rusch, P.A.-C., of the Anthon Mercy Medical Clinic. Friedel’s blood pressure was slightly elevated at 142/98, and notes indicate he “has had cardiac disease in the past.” (R. 195) He passed the rest of the physical. (*Id.*)

On August 10, 2000, Friedel was seen by Edward J. Zajac, Jr., M.D. at Mercy Medical Center in Sioux City, Iowa, for “evaluation of chest pain compatible with an acute myocardial infarction.” (R. 139) He gave a history of an acute myocardial infarction in 1992, with ongoing cardiac treatment since that time. The doctor noted Friedel had multiple risks for heart disease, including high blood pressure, high cholesterol, family history of heart disease, and the fact that he was a smoker. Urgent cardiac catheterization revealed advanced coronary artery disease. Doctors believed the most significant problem was a large diagonal vessel extending to the apex of the left anterior descending, where the catheterization revealed “a complex proximal tubular lesion at 90% with associated thrombus.” (R. 142) Blood flow to his heart was reestablished with initial drug therapy and Friedel was stabilized with the placement of an intra-aortic balloon pump. (*Id.*) He was referred for further evaluation to consider revascularization, and possibly even a heart transplant.

On August 17, 2000, Friedel saw Wayne E. Richenbacher, M.D. at the University of Iowa Hospitals and Clinics, Division of Cardiothoracic Surgery. (R. 150-51) Dr. Richenbacher recommended primary bypass grafting, and the surgery was scheduled for August 28, 2000. He did not believe transplant evaluation was warranted at that time. (R. 151)

On August 21, 2000, Friedel was admitted into Mercy Medical Center in Sioux City, with complaints of belching – a symptom that had preceded previous cardiac incidents – and diaphoresis. Friedel stated he had been vacuuming his carpet when the symptoms began. Stephen R. Zumbrun, M.D. noted, “Because of his known bad coronary disease and need for coronary revascularization and bad left ventricular function, [Friedel] was admitted to the hospital.” (R. 153) Friedel’s symptoms returned about 10:00 p.m.,

and he was started on Heparin. His symptoms abated, and he was discharged the next day feeling well, with an unremarkable cardiac examination. (*Id.*)

Friedel was admitted to the University of Iowa Hospital on August 22, 2000, for preoperative stabilization, testing, and procedures. On August 28, 2000, he was transferred to the Cardiothoracic Surgery Division where he underwent coronary revascularization. Dr. Richenbacher noted Friedel's heart was somewhat enlarged. Friedel developed a fever on September 1, 2000, and he was started on Augmentin for suspected pneumonia. On September 3, 2000, he developed edema in his left leg, and he was started on Coumadin. He was discharged on September 7, 2000, after his condition had stabilized and improved. He was directed to eat a low cholesterol diet with no added salt, walk twice daily, and exercise as directed by Physical Therapy. He also was told not to lift more than five pounds for three months, and not to drive for four months. (R. 157-58, 160-71)

On September 12, 2000, Friedel was taken by ambulance from his home in Oto, Iowa, to Mercy Medical Center in Sioux City. (*See* R. 172-80) He was complaining of sweating, chest discomfort, weakness, fatigue, and bowel concerns. He was given a transfusion of fresh frozen plasma and IV fluids to stabilize him. He underwent a lung X-ray on September 13, 2000, but the films were "suboptimal" because Friedel was unable to hold his breath well. (R. 178) On September 14, 2000, he underwent an upper gastrointestinal endoscopy. Preoperative diagnosis was a suspected upper gastrointestinal bleed, but no active bleeding was discovered. Postoperative notes indicate Friedel had "a small ulcerated area in the proximal stomach that was granulating in nicely. Also had diffuse gastritis." (R. 176) Doctors prescribed an anti-coagulant (Carfate) and a proton pump inhibitor (Prilosec), and told him not to take aspirin. (*Id.*)

Friedel saw P.A. Rusch for follow-up lab work weekly for the next five weeks. (See R. 190-93, 197-204) His medication dosages were adjusted as needed. He reported periodic pain and irritation at his incision sites, but these complaints apparently resolved without treatment. At his appointment on November 6, 2000 (*see* R. 190, 197), Friedel complained of right shoulder pain that was causing him difficulty with his cardiac rehabilitation. P.A. Rusch advised him to use heat on the shoulder, and he was given some exercises to do “including the paint can swirls and walking the wall.” (R. 190) He was told not to overdo, and to “let pain be the deciding factor.” (*Id.*)

Friedel continued to have regular lab work to check his medications and lipid levels. He was seen on December 4 and 20, 2000, and on February 26 and April 30, 2001. (R. 183-86, 189, 196-88) At his February 26th appointment, Friedel reported he was “having no particular problems as far as the chest is concerned,” but he was having problems with his right hip when he tried to get up from laying flat on the floor or the ground. P.A. Rusch diagnosed a lumbar strain and told Friedel to use heat on his back. (R. 184)

At his appointment on April 30, 2001, Friedel reported his shortness of breath was worsening. P.A. Rusch noted the following regarding Friedel’s condition:

He is not following the restriction of working only 10 hours a week with a 20 pound weight restriction, but is back to doing his job to the best of his ability. When he climbs a hill he has a lot of difficulty. Walking on a flat surface is no problem.

(R. 183) Friedel received a prescription for Nasacort to help him get through the allergy season. He was told to return to work restrictions that had been imposed by Dr. Peacock. (*Id.*)

On June 4, 2001, Friedel underwent an evaluation by Craig W. Bainbridge, M.D. of Pulmonary Associates, at the request of Disability Determination Services. (R. 181)

Dr. Bainbridge's impressions were as follows: "1) Organic heart disease, coronary artery disease, atherosclerotic vascular disease. History of myocardial infarction, status post coronary bypass graft with areas of hypokinesis and dyskineses. 2) History of tobacco abuse in the past. 3) Hypercholesterolemia." *Id.* Dr. Bainbridge included the following comments in his report:

We have a young man who has had extensive myocardial damage who has been told by his doctors not to lift more than 20 pounds. He cannot carry over 20 pounds. He can really stand, move about, walk, and sit all right in an 8 hour day. He cannot do any climbing as it affects his cardiovascular system. He thinks he could probably stoop but kneeling or crawling are questionable. He has no difficulty handling objects, seeing, hearing, speaking, or traveling. He has no trouble with the work environment for example dust, fumes, temperature hazards. Cardiac status appears to be tenuous. He has not had any chest pain, but he appears to have an anginal equivalent of burping. He does get tired with activities. He is able to handle activities of daily living.

Id.

Jon A. Peacock, M.D. saw Friedel on June 12, 2001, for follow-up. Friedel reported continued exertional dyspnea but no exertional angina, pedal edema or paroxysmal nocturnal dyspnea. He complained of "a lot of heartburn symptoms and also some belching recently," and noted that he had never had much chest pain, but increased belching had preceded his initial myocardial infarction. Stress testing indicating Friedel's exercise tolerance had improved, as had his systolic function. Dr. Peacock discontinued Lopid because of the risk of dyspepsia. He started Friedel on Prevacid for a three-week trial, and continued him on Lipitor. He urged Friedel to continue on a low-fat diet. (R. 233-35)

Dr. Peacock noted the following regarding Friedel's cardiac condition:

[Friedel] tells me that he occasionally does get some mild lightheadedness and he did have frequent PVCs with exercise today. I think it is important to rule out a significant dysrhythmia and I have given [him] an Event monitor to use for the next month. I will plan on following up with him in about 6 weeks to go over the results. At that point, if there is no evidence of any dysrhythmia, we can probably relax [his] weight restriction of only lifting 20 pounds.

(R. 234)

On June 20, 2001, Lawrence F. Staples, M.D. completed a Residual Functional Capacity Assessment form following his review of Friedel's medical records. Dr. Staples concluded Friedel could lift up to ten pounds frequently and twenty pounds occasionally; stand and/or walk and/or sit for up to six hours in an eight-hour workday; and perform pushing/pulling activities without limitation. He opined Friedel could occasionally climb ramps/stairs, stoop, kneel, crouch and crawl, and frequently balance. He found Friedel had no manipulative, visual, or communicative limitations, and the only environmental limitation he noted was that Friedel should avoid concentrated exposure to extreme cold.

(R. 210-17)

In his supplement to the RFC form, Dr. Staples noted Friedel had medically determinable impairments consisting of "coronary artery disease, s/p MI, s/p PTCA and stent, s/p CABG with cardiomyopathy; obese (BMI approximately 40); stomach ulcer, s/p GI bleed." (R. 218) He found the impairments to be severe but not of Listing magnitude. *Id.* Dr. Staples noted Friedel could handle the activities of daily living, he was working ten hours a week lifting twenty-five pounds or more, he was on the city council, he helped with two children for a few hours each day, he drove a car several times each week, and he "gets groceries for his wife." *Id.* Friedel reported getting sharp pain in his chest if he

over-exerted. Dr. Staples also noted Friedel was “influenced by deep breath or in position of lying on his side – features atypical for angina.” *Id.*

H. Richard Hornberger, M.D. reviewed Dr. Staples’s findings on March 19, 2002, and concurred in the RFC assessment. (R. 217)

Friedel next saw P.A. Rusch on September 5, 2001. He reportedly had been seen in the E.R. a day or two earlier for cellulitis, and was placed on Keflex. His leg worsened, Keflex was discontinued, and he was placed on Floxin. At this follow-up appointment with P.A. Rusch, Friedel’s leg was much improved. Friedel was directed to finish up the Floxin, and to report back to P.A. Rusch if there was any redness, irritation, or swelling in his leg by the time the Floxin was gone. (R. 223)

On October 23, 2001, Friedel saw P.S. Rusch with complaints of pain in his right rib cage area. He stated the pain started a few days earlier in conjunction with coughing and sneezing, and he had developed some tingling down his right arm. He was not experiencing trouble breathing or any chest pain. P.A. Rusch directed Friedel to “force fluids,” and prescribed Amoxil and Claritin. He was told to take over-the-counter anti-inflammatories as needed for pain. (R. 222-23)

On November 12, 2001, Friedel returned for follow-up and stated he was still having pain in his mid-chest, worsening at the bottom of his rib cage. He stated it hurt him to breathe deeply or push down. Friedel expressed concern that he had “busted a wire loose” from his previous bypass surgery. He also reported frequent heartburn, stating he “eats Tums like candy.” (R. 222) P.A. Rusch diagnosed Friedel with a possible pectoralis major muscle tear, chronic gastritis, and possible ulcer disease. He scheduled an upper GI and an MRI for November 15, 2001, to rule out a tear in Friedel’s pectoralis muscle. He prescribed Tylenol #3 for pain, and directed Friedel to alternate heat and ice on the painful area. (R. 221-22)

Friedel returned the following day. He reported the pain was no better and he had gotten little sleep in spite of the Tylenol #3. P.A. Rusch put Friedel in a rib belt and told him to wear it as much as he could tolerate, and continue alternating heat and ice. An EKG was unremarkable. P.A. Rusch consulted with Dr. Bittner, who concurred in the plan to have the upper GI and MRI. (R. 220)

No evidence appears in the Record of the MRI and upper GI series scheduled by P.A. Rusch. In addition, further patient records from P.A. Rusch do not reference the tests or any results from them. However, Dr. Peacock's notes indicate Friedel did, in fact, have an MRI scan "which was unremarkable," and on December 3, 2001, Dr. Peacock noted Friedel's symptoms had completely subsided. (R. 229)

P.A. Rusch's progress notes indicate he made an appointment for Friedel at the Mercy Pain Clinic, scheduled for November 29, 2001. However, the appointment was cancelled after Friedel called and reported that he had slipped and fallen, caught himself, and had not had any pain since that time. (R. 220)

On December 3, 2001, Friedel saw Dr. Peacock for follow-up. He underwent an echocardiogram that revealed some increase in the overall left ventricular size "with probable mild reduction in left ventricular systolic function"; increased size of left atrial; inferior posterior hypokineses; trace mitral and tricuspid insufficiency; and no evidence of pericardial effusion. (R. 226-27) Dr. Peacock noted Friedel had been "feeling much better over the last several weeks and continue[d] to do his daily activities with no paroxysmal nocturnal dyspnea, dyspnea on exertion, syncope, presyncope or exertional chest discomfort." (R. 229) The doctor made no change in Friedel's medication regimen, which included Atenolol 25 mg. twice daily; Lipitor 80 mg. daily; Glucosamine; one multivitamin daily; Altace 2.5 mg daily; and one aspirin daily. (R. 229-30)

On July 24, 2002, John A. McMeekin, Ed.D. performed a Psychological/Intellectual Assessment of Friedel at the request of Vocational Rehabilitation Services. (R. 236-40) Dr. McMeekin administered the Woodcock-Johnson Tests of Achievement and the Wechsler Adult Intelligence Test-III. Testing indicated Friedel has a marked learning disability in terms of spelling and writing; letter-word identification at approximately the third grade level; and comprehension at approximately the fifth grade level. His math skills are average. His overall functioning was assessed at a full scale IQ of 80, which Dr. McMeekin noted is in the borderline range of intellectual functioning. (*Id.*)

Dr. McMeekin noted the following regarding the potential for Friedel to participate in vocational training:

If [he] goes to any formal training where there is substantial reliance on written material and textbooks, he will have to have tests read to him and possibly books on tape, even though in my experience most people are not patient enough to listen to those, but they could be tried. Rather than taking notes he would have to have copies of notes given to him and copies of summaries of chapters would be useful. He will especially need someone to work with who is qualified to work with students with disabilities and make accommodations as appropriate for particular course subject matter and instructor's style. It is difficult to anticipate all that in advance if [he] receives any further education.

(R. 233)

Friedel returned to see Dr. Peacock for follow-up on July 31, 2002. Friedel had been stable since his last visit in December 2001, and his medications were unchanged. His EKG was unchanged from the prior visit. Dr. Peacock switched Friedel from Altace to Cozaar due to a frequent cough which Friedel related to sinus drainage. The doctor

recommended a repeat lipid panel, and electrolytes and a BUN/creatinine test. He directed Friedel to return in six months for a Nuclear treadmill test and further follow-up. (R. 241)

Dr. Peacock wrote an opinion letter to Friedel's attorney on September 18, 2002. He indicated Friedel was on medications for coronary disease and left ventricular dysfunction, and his condition would limit his ability to do heavy physical labor. He noted Friedel's heart function was not expected to improve in the future. Dr. Peacock stated he had advised Friedel not to do any heavy lifting and to avoid temperature extremes, both of which would increase his risk of sudden, and potentially fatal, cardiac events. The doctor indicated Friedel's condition remained stable. (R. 244)

On September 20, 2002, P.A. Rusch wrote an opinion letter to Friedel's attorney. He noted Friedel had a permanent lifting restriction of twenty pounds, and he should not perform any heavy or exertional work. P.A. Rusch noted that on six occasions, he had sent copies of medical records to Iowa Disability Determination Services Bureau, and on each occasion, he had offered to perform an impairment rating on Friedel, but no evaluation was ever scheduled with his office. Because he had not performed an impairment rating, P.A. Rusch stated he was unable to provide an estimate of Friedel's physical capabilities. (R. 246)

Friedel saw Dr. Peacock for follow-up on March 12, 2003. Friedel reported his cough had been relieved by the ACE-II receptor blocker (Cozaar). Friedel underwent a nuclear treadmill test that indicated a reduction in his exercise tolerance (from eight minutes down to six minutes on the Bruce protocol). He stopped the test due to shortness of breath; however, he had no chest discomfort with exercise. Dr. Peacock increased the Cozaar dosage from 50 mg to 100 mg daily. He continued to advise Friedel to avoid heavy lifting and temperature extremes. Dr. Peacock noted Friedel had stopped smoking

and had remained off of cigarettes. He recommended Friedel exercise and try to lose some weight. He directed Friedel to return for follow-up in six months. (R. 264)

4. *Vocational expert's testimony*

VE Sandra Trudeau prepared a report that indicates Friedel's past relevant work includes two jobs -- automobile mechanic and farm equipment mechanic I. Both of the jobs are classified by the Dictionary of Occupational Titles as medium, skilled jobs, but the VE noted both jobs were "very heavy" as performed by Friedel. (R. 309-10; *see* R. 137)

The ALJ asked VE Trudeau the following hypothetical question:

[C]onsider what effect it would have on the Claimant's ability to perform work activity if he was limited to 20 pounds occasional lifting, 10 pounds frequent lifting. He could only infrequently climb, could not do any prolonged walking on a flat surface more than eight minutes, should not work in excessively hot or humid work areas, could only occasionally bend or stoop or squat, that he has a low word recognition score and – but reading comprehension is at the 5.1 grade level, could not [do] any work which required more than very little spelling, basic math skills were about average. Any training would have to be done by verbal instruction rather than written instruction or use of written materials, [and] because of his cardiac problems, a need to avoid stressful work[,] [h]e should avoid stress interaction, being involved in emergency situations or having to do any fast paced, strict deadline work. With those limitations, would he be able to return to any of the past relevant work?

(R. 310-11) The VE replied the hypothetical claimant would not be able to return to any of Friedel's past relevant work. Further, none of the claimant's past relevant work would have given him skills that would transfer to other work. (R. 311)

The ALJ asked the VE to consider that the claimant “is a younger individual with a limited education, resulting in the academic limitations I gave you in the hypothetical question,” and he asked, with those limitations, whether the claimant would be able to perform any unskilled work. The VE replied:

Based on those limitations, there would be some unskilled work that he would be able to perform. There would be a cashier in the sedentary range. In the State of Iowa, there are 1,538. There would be a[n] order filler. There are 63 sedentary and 77 sorters in the sedentary. And that would be all.

(*Id.*) The VE stated there would be no light jobs the hypothetical claimant could perform due to his limitation on prolonged walking on a flat surface for more than eight minutes (R. 311-12)

The ALJ then asked the VE to consider, in addition, that the claimant would need to rest, and to stop and catch his breath, after a short period of activity. The VE stated with that limitation, the claimant would be unable to perform any type of competitive work. (R. 312)

5. *The ALJ’s decision*

The ALJ found Friedel had not engaged in substantial gainful activity since July 30, 2000. (R. 15) He found Friedel has severe impairments consisting of “status post open heart surgery, coronary artery disease and status post myocardial infarction.” (*Id.*) However, the ALJ found none of Friedel’s impairments, singly or in combination, met or medically equaled a listed impairment under applicable regulations. (*Id.*)

The ALJ found Friedel’s testimony concerning his impairment-related limitations, as well as Glynis Friedel’s corroborating testimony, to be inconsistent with the medical

evidence and not fully credible. The ALJ noted Friedel had not diminished his activities of daily living significantly; after his surgery, he had continued to work as a mechanic beyond the level that was advised by his physician; and no physician ever had stated he was incapable of working at any level. Medical testing indicated Friedel had reduced exercise tolerance, but his doctors had only advised him to avoid heavy lifting and activities requiring heavy exertion. The ALJ noted Friedel did not complain to his physicians about side effects from his medications, and the evidence indicates his heart condition was being controlled by medication. Viewing the record as a whole, the ALJ concluded Friedel's impairments were not as limiting as he and his wife testified. (R17-19)

The ALJ assessed Friedel's residual functional capacity as follows:

After careful consideration of all of the evidence, the undersigned finds that the claimant has the residual functional capacity to lift and/or carry no more than 20 pounds occasionally and 10 pounds frequently; sit, stand and walk about 6 hours in an 8 hour workday; push and pull without limitation other than as shown for lifting and carrying; infrequent climbing; no prolonged walking on flat surfaces greater than 8 minutes; occasional bending, stooping or squatting; no excessively hot/humid work areas; fifth grade reading comprehension; little spelling required; average basic math skills; any training must be verbal rather than written; must avoid stressful work such as stressful interaction, handling emergency situations and fast paced strict deadline work.

(R. 19) Given this RFC, the ALJ concluded Friedel could not return to any of his past relevant work, and he had no transferable skills. However, the ALJ found Friedel's RFC "for the full range of light work has not been significantly compromised by his exertional and nonexertional limitations," and based on the VE's testimony, the ALJ found Friedel

could perform a number of unskilled, sedentary jobs in the national economy. (R. 19-20)
The ALJ therefore concluded Friedel was not disabled. (R. 21, 22)

III. DISABILITY DETERMINATIONS, THE BURDEN OF PROOF, AND THE SUBSTANTIAL EVIDENCE STANDARD

A. Disability Determinations and the Burden of Proof

Section 423(d) of the Social Security Act defines a disability as the “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.” 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 404.1505. A claimant has a disability when the claimant is “not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists . . . in significant numbers either in the region where such individual lives or in several regions of the country.” 42 U.S.C. § 432(d)(2)(A).

To determine whether a claimant has a disability within the meaning of the Social Security Act, the Commissioner follows a five-step sequential evaluation process outlined in the regulations. 20 C.F.R. §§ 404.1520 & 416.920; *Dixon v. Barnhart*, 353 F.3d 602, 605 (8th Cir. 2003); *Kelley v. Callahan*, 133 F.3d 583, 587-88 (8th Cir. 1998) (citing *Ingram v. Chater*, 107 F.3d 598, 600 (8th Cir. 1997)). First, the Commissioner will consider a claimant’s work activity. If the claimant is engaged in substantial gainful activity, then the claimant is not disabled. 20 C.F.R. § 404.1520(4)(i).

Second, if the claimant is not engaged in substantial gainful activity, the Commissioner looks to see “whether the claimant has a severe impairment that significantly limits the claimant’s physical or mental ability to perform basic work activities.” *Dixon*, 353

F.3d at 605; *accord Lewis v. Barnhart*, 353 F.3d 642, 645 (8th Cir. 2003). The United States Supreme Court has explained:

The ability to do basic work activities is defined as “the abilities and aptitudes necessary to do most jobs.” . . . Such abilities and aptitudes include “[p]hysical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling”; “[c]apacities for seeing, hearing, and speaking”; “[u]nderstanding, carrying out and remembering simple instructions”; “[u]se of judgment”; “[r]esponding appropriately to supervision, co-workers, and usual work situations”; and “[d]ealing with changes in a routine work setting.”

Bowen v. Yuckert, 482 U.S. 137, 140-42, 107 S. Ct. 2287, 2291, 96 L. Ed. 2d 119 (1987) (citing 20 C.F.R. §§ 404.1521(b), 416.921(b)).

Third, if the claimant has a severe impairment, then the Commissioner will consider the medical severity of the impairment. If the impairment meets or equals one of the presumptively disabling impairments listed in the regulations, then the claimant is considered disabled, regardless of age, education, or work experience. 20 C.F.R. § 404.1520; *Kelley*, 133 F.3d at 588.

Fourth, if the claimant’s impairment is severe, but it does not meet or equal one of the presumptively disabling impairments, then the Commissioner will assess the claimant’s residual functional capacity (“RFC”) to determine the claimant’s “ability to meet the physical, mental, sensory, and other requirements” of the claimant’s past relevant work. 20 C.F.R. §§ 404.1520(4)(iv); 404.1545(4); *see Lewis*, 353 F.3d at 645-46 (“RFC is a medical question defined wholly in terms of the claimant’s physical ability to perform exertional tasks or, in other words, ‘what the claimant can still do’ despite his or her physical or mental limitations.”) (citing *Bradshaw v. Heckler*, 810 F.2d 786, 790 (8th Cir. 1987); 20 C.F.R. § 404.1520(e) (1986)); *Dixon, supra*. The claimant is responsible for

providing evidence the Commissioner will use to make a finding as to the claimant's RFC, but the Commissioner is responsible for developing the claimant's "complete medical history, including arranging for a consultative examination(s) if necessary, and making every reasonable effort to help [the claimant] get medical reports from [the claimant's] own medical sources." 20 C.F.R. § 404.1545(3). The Commissioner also will consider certain non-medical evidence and other evidence listed in the regulations. *See id.* If a claimant retains the RFC to perform past relevant work, then the claimant is not disabled. 20 C.F.R. § 404.1520(4)(iv).

Fifth, if the claimant's RFC as determined in step four will not allow the claimant to perform past relevant work, then the burden shifts to the Commissioner "to prove that there is other work that [the claimant] can do, given [the claimant's] RFC [as determined at step four], age, education, and work experience." Clarification of Rules Involving Residual Functional Capacity Assessments, etc., 68 Fed. Reg. 51,153, 51,155 (Aug. 26, 2003). The Commissioner must prove not only that the claimant's RFC will allow the claimant to make an adjustment to other work, but also that the other work exists in significant numbers in the national economy. *Id.*; 20 C.F.R. § 404.1520(4)(v); *Dixon, supra*; *Pearsall v. Massanari*, 274 F.3d 1211, 1217 (8th Cir. 2001) ("[I]f the claimant cannot perform the past work, the burden then shifts to the Commissioner to prove that there are other jobs in the national economy that the claimant can perform.") (citing *Cox v. Apfel*, 160 F.3d 1203, 1206 (8th Cir. 1998)); *Nevland v. Apfel*, 204 F.3d 853, 857 (8th Cir. 2000). If the claimant can make an adjustment to other work that exists in significant numbers in the national economy, then the Commissioner will find the claimant is not disabled. If the claimant cannot make an adjustment to other work, then the Commissioner will find the claimant is disabled. 20 C.F.R. § 404.1520(r)(v).

B. The Substantial Evidence Standard

The court reviews an ALJ's decision to determine whether the ALJ applied the correct legal standards, and whether the factual findings are supported by substantial evidence on the record as a whole. *Hensley v. Barnhart*, 352 F.3d 353, 355 (8th Cir. 2003); *Banks v. Massanari*, 258 F.3d 820, 823 (8th Cir. 2001) (citing *Lowe v. Apfel*, 226 F.3d 969, 971 (8th Cir. 2000)); *Berger v. Apfel*, 200 F.3d 1157, 1161 (8th Cir. 2000) (citing 42 U.S.C. § 405(g); *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 28 L. Ed. 2d 842 (1971)). This review is deferential; the court must affirm the ALJ's factual findings if they are supported by substantial evidence on the record as a whole. *Id.* (citing *Estes v. Barnhart*, 275 F.3d 722, 724 (8th Cir. 2002); *Krogmeier v. Barnhart*, 294 F.3d 1019, 1022 (8th Cir. 2002) (citing *Prosch v. Apfel*, 201 F.3d 1010, 1012 (8th Cir. 2000)); *Kelley v. Callahan*, 133 F.3d 583, 587 (8th Cir. 1998) (citing *Matthews v. Bowen*, 879 F.2d 422, 423-24 (8th Cir. 1989)); 42 U.S.C. § 405(g) ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive. . . ."). Under this standard, "[s]ubstantial evidence is less than a preponderance but is enough that a reasonable mind would find it adequate to support the Commissioner's conclusion." *Krogmeier, id.*; *Weiler v. Apfel*, 179 F.3d 1107, 1109 (8th Cir. 1999) (citing *Pierce v. Apfel*, 173 F.3d 704, 706 (8th Cir. 1999)); accord *Gowell v. Apfel*, 242 F.3d 793, 796 (8th Cir. 2001) (citing *Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000)); *Hutton v. Apfel*, 175 F.3d 651, 654 (8th Cir. 1999); *Woolf v. Shalala*, 3 F.3d 1210, 1213 (8th Cir. 1993).

Moreover, substantial evidence "on the record as a whole" requires consideration of the record in its entirety, taking into account both "evidence that detracts from the Commissioner's decision as well as evidence that supports it." *Krogmeier*, 294 F.3d at 1022 (citing *Craig*, 212 F.3d at 436); *Willcuts v. Apfel*, 143 F.3d 1134, 1136 (8th Cir.

1998) (quoting *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488, 71 S. Ct. 456, 464, 95 L. Ed. 456 (1951)); *Gowell*, 242 F.3d at 796; *Hutton*, 175 F.3d at 654 (citing *Woolf*, 3 F.3d at 1213); *Kelley*, 133 F.3d at 587 (citing *Cline v. Sullivan*, 939 F.2d 560, 564 (8th Cir. 1991)). The court must “search the record for evidence contradicting the [Commissioner’s] decision and give that evidence appropriate weight when determining whether the overall evidence in support is substantial.” *Baldwin v. Barnhart*, 349 F.3d 549, 555 (8th Cir. 2003) (also citing *Cline*, *supra*).

In evaluating the evidence in an appeal of a denial of benefits, the court must apply a balancing test to assess any contradictory evidence. *Sobania v. Secretary of Health & Human Serv.*, 879 F.2d 441, 444 (8th Cir. 1989) (citing *Steadman v. S.E.C.*, 450 U.S. 91, 99, 101 S. Ct. 999, 1006, 67 L. Ed. 2d 69 (1981)). The court, however, does not “reweigh the evidence presented to the ALJ,” *Baldwin*, 349 F.3d at 555 (citing *Bates v. Chater*, 54 F.3d 529, 532 (8th Cir. 1995)), or “review the factual record *de novo*.” *Roe v. Chater*, 92 F.3d 672, 675 (8th Cir. 1996) (citing *Naber v. Shalala*, 22 F.3d 186, 188 (8th Cir. 1994)). Instead, if, after reviewing the evidence, the court finds it “possible to draw two inconsistent positions from the evidence and one of those positions represents the agency’s findings, [the court] must affirm the [Commissioner’s] decision.” *Id.* (quoting *Robinson v. Sullivan*, 956 F.2d 836, 838 (8th Cir. 1992), and citing *Cruse v. Bowen*, 867 F.2d 1183, 1184 (8th Cir. 1989)); accord *Baldwin*, 349 F.3d at 555; *Young v. Apfel*, 221 F.3d 1065, 1068 (8th Cir. 2000). This is true even in cases where the court “might have weighed the evidence differently.” *Culbertson v. Shalala*, 30 F.3d 934, 939 (8th Cir. 1994) (citing *Browning v. Sullivan*, 958 F.2d 817, 822 (8th Cir. 1992)); accord *Krogmeier*, 294 F.3d at 1022 (citing *Woolf*, 3 F.3d at 1213). The court may not reverse the Commissioner’s decision “merely because substantial evidence would have supported an opposite decision.” *Baldwin*, 349 F.3d at 555 (citing *Grebenick v. Chater*, 121 F.3d

1193, 1198 (8th Cir. 1997)); *Young*, 221 F.3d at 1068; *see Pearsall*, 274 F.3d at 1217; *Gowell*, 242 F.3d at 796; *Spradling v. Chater*, 126 F.3d 1072, 1074 (8th Cir. 1997).

On the issue of an ALJ's determination that a claimant's subjective complaints lack credibility, the Sixth and Seventh Circuits have held an ALJ's credibility determinations are entitled to considerable weight. *See, e.g., Young v. Secretary of H.H.S.*, 957 F.2d 386, 392 (7th Cir. 1992) (citing *Cheshier v. Bowen*, 831 F.2d 687, 690 (7th Cir. 1987)); *Gooch v. Secretary of H.H.S.*, 833 F.2d 589, 592 (6th Cir. 1987), *cert. denied*, 484 U.S. 1075, 108 S. Ct. 1050, 98 L. Ed. 2d. 1012 (1988); *Hardaway v. Secretary of H.H.S.*, 823 F.2d 922, 928 (6th Cir. 1987). Nonetheless, in the Eighth Circuit, an ALJ may not discredit a claimant's subjective allegations of pain, discomfort or other disabling limitations simply because there is a lack of objective evidence; instead, the ALJ may only discredit subjective complaints if they are inconsistent with the record as a whole. *See Hinchey v. Shalala*, 29 F.3d 428, 432 (8th Cir. 1994); *see also Bishop v. Sullivan*, 900 F.2d 1259, 1262 (8th Cir. 1990) (citing *Polaski v. Heckler*, 739 F.2d 1320, 1322 (8th Cir. 1984)). As the court explained in *Polaski v. Heckler*:

The adjudicator must give full consideration to all of the evidence presented relating to subjective complaints, including the claimant's prior work record, and observations by third parties and treating and examining physicians relating to such matters as:

- 1) the claimant's daily activities;
- 2) the duration, frequency and intensity of the pain;
- 3) precipitating and aggravating factors;
- 4) dosage, effectiveness and side effects of medication;
- 5) functional restrictions.

Polaski, 739 F.2d 1320, 1322 (8th Cir. 1984). *Accord Ramirez v. Barnhart*, 292 F.3d 576, 580-81 (8th Cir. 2002).

IV. ANALYSIS

Friedel argues the ALJ erred in three respects: (1) in disregarding evidence from Friedel's treating physician, Dr. Peacock; (2) in failing to conduct a proper *Polaski* analysis when discrediting Friedel's testimony and that of his wife; and (3) in posing an inaccurate hypothetical question to the VE. Therefore, Friedel asserts the record does not contain substantial evidence to support the ALJ's conclusion that he is not disabled.

Addressing Friedel's first argument, he argues the ALJ disregarded Dr. Peacock's statements regarding Friedel's "need to stop exertion due to shortness of breath." Friedel notes that when posed with a hypothetical question that included a person's having to stop and rest to catch his breath after a short period of activity, the VE stated the person would be unable to perform any type of competitive work.

The record indicates that both Dr. Peacock and P.A. Rusch documented Friedel's subjective complaints that he was experiencing shortness of breath upon exertion. On April 30, 2001, Friedel complained to P.A. Rusch that his shortness of breath was worsening. (R. 183) This appears to have been due to seasonal allergies, as P.A. Rusch prescribed Nasacort to get him through the allergy season, and Friedel did not return for follow-up or complain that the problem had not been resolved. In October 2001, Friedel reported to P.A. Rusch that he was not experiencing any shortness of breath. (R. 222-23) Although he was experiencing pain on deep breathing, this appears to have been due to a pectoralis major muscle tear or strain. (See R. 221-23)

On March 12, 2003, Dr. Peacock noted Friedel could only complete six minutes on the treadmill due to shortness of breath. (R. 263-64) This was a reduction from eight minutes on the treadmill in June 2001, and Dr. Peacock noted Friedel had reduced exercise tolerance for his age, and shortness of breath upon exertion. (R. 263-64)

The court does not find this evidence to be in conflict with the ALJ's findings. Reduced exercise tolerance and an inability to engage in vigorous exertion without shortness of breath does not equate to an inability to engage in any kind of work activity. No medical professional has suggested Friedel would be unable to engage in sedentary work activities which, by definition, do not entail vigorous or prolonged exertion. Furthermore, the court finds Friedel's daily activities indicate he has the ability to perform sedentary work. He takes daily walks, helps care for his children, does a number of household chores and light outdoor chores, runs errands, and fixes cars. (*See* R. 104-09) These are not the activities of someone who is as limited as Friedel and his wife suggested in their testimony.

The ALJ properly gave significant weight to Dr. Peacock's opinions, and the court finds the ALJ's RFC assessment is consistent with Dr. Peacock's assessment of Friedel's condition.

Having so found, the court further agrees with the ALJ's credibility determination. The ALJ discussed the *Polaski* factors in some detail, and found Friedel's allegations of disabling limitations were not supported by the record. The court finds the ALJ properly supported his credibility findings as to both Friedel and his wife.

The court also finds the ALJ's hypothetical question to the VE was proper, and included all of Friedel's limitations. Based on the hypothetical, the VE opined Friedel could perform unskilled, sedentary work, and the ALJ relied on that opinion in reaching his decision.

Considering the evidence as a whole, the court finds the record contains substantial evidence to support the ALJ's decision. It is not enough that the court might have weighed the evidence differently. *Culbertson v. Shalala*, 30 F.3d 934, 939 (8th Cir. 1994) (citing *Browning v. Sullivan*, 958 F.2d 817, 822 (8th Cir. 1992)); accord *Krogmeier*, 294 F.3d

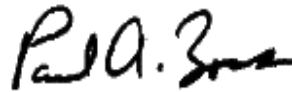
at 1022 (citing *Woolf*, 3 F.3d at 1213). The court may not reverse the Commissioner's decision "merely because substantial evidence would have supported an opposite decision." *Baldwin*, 349 F.3d at 555 (citing *Grebenick v. Chater*, 121 F.3d 1193, 1198 (8th Cir. 1997)); *Young*, 221 F.3d at 1068; see *Pearsall*, 274 F.3d at 1217; *Gowell*, 242 F.3d at 796; *Spradling v. Chater*, 126 F.3d 1072, 1074 (8th Cir. 1997).

V. CONCLUSION

For the reasons discussed above, **IT IS RESPECTFULLY RECOMMENDED**, unless any party files objections² to the Report and Recommendation in accordance with 28 U.S.C. § 636 (b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service of a copy of this Report and Recommendation, that the Commissioner's decision be affirmed, and judgment be entered for the Commissioner and against Friedel.³

IT IS SO ORDERED.

DATED this 26th day of October, 2004.



PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

²Objections must specify the parts of the report and recommendation to which objections are made. Objections must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. See Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. See *Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).

³NOTE: If the district court overrules this recommendation and final judgment is entered for the plaintiff, the plaintiff's counsel must comply with the requirements of Local Rule 54.2(b) in connection with any application for attorney fees.

